Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the State Independent Alliance and	)	
the Independent Telecommunications Group	)	WT Docket No. 00-239
for a Declaratory Ruling That the Basic	)	
Universal Service Offering Provided by	)	
Western Wireless in Kansas is Subject to	)	
Regulation as Local Exchange Service	)	

To: Wireless Telecommunications Bureau
Commercial Wireless Division
Rules and Policy Branch

WESTERN WIRELESS CORPORATION
OPPOSITION TO PETITION FOR RECONSIDERATION

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WESTERN WIRELESS CORPORATION
OPPOSITION TO PETITION FOR RECONSIDERATION

Western Wireless Corporation ("Western Wireless"), by counsel, hereby files these comments in opposition to the Petition for Reconsideration and Clarification ("Petition") in the above referenced docket, filed September 3, 2002 by the State Independent Alliance and the Independent Telecommunications Group ("the Independents"). 1/ In the Commission's August 2, 2002 *Memorandum Opinion and Order* ("Order") in this proceeding, 2/ the Commission rejected the Independents' original petition for declaratory ruling that requested the Commission to clarify that

1/ *See* "Wireless Telecommunications Bureau Seeks Comment on Petition for Reconsideration and Clarification of Commission Order Regarding Western Wireless' Basic Universal Service Offering in Kansas," *Public Notice*, DA 02-2266 (rel. Sept. 16, 2002).

2/ *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802 (2002).

Western Wireless' Basic Universal Service ("BUS") offering is a not a Commercial Mobile Radio Service ("CMRS").

INTRODUCTION AND SUMMARY

The current Petition, like the Independents' petition for declaratory ruling, is a thinly-veiled attempt to shut out the competition that Western Wireless is bringing to the areas dominated up to now by the Independents. In its Order, the Commission correctly rejected the Independents' anti-competitive attempt to circumvent the prohibition in Section 332(c)(3) of the Communications Act of 1934, as amended ("the Act"), against state regulation of the entry or rates of CMRS operators. The current Petition is little more than a stale regurgitation of previously-considered arguments combined with unsupported legal assertions, and should meet the same fate as the Independents' original petition.

The Commission's decision that the terminal equipment used with BUS "ordinarily does move," and therefore that the BUS offering qualifies as a mobile service, is solidly supported by multiple uncontested facts in the record, including billing records that prove actual mobile use. Moreover, the Commission's interpretation of the statutory definition of "mobile station" is eminently more reasonable than the infeasible one proffered by the Independents, which would require continual changes in the regulatory status of wireless services as consumer usage of equipment changes. As the agency charged with implementation of the Communications Act, the Commission properly filled the gap inherent in the statutory definition, while basing its decision on existing precedent that has been accepted by Congress. The Commission also properly relied on well-established precedent in

determining that BUS should be treated as CMRS because it is "incidental" to Western Wireless' regular cellular service, with which it shares the same spectrum and network infrastructure. Finally, the Commission's decision requires no "clarification" regarding the prohibition on state universal service fund support that is conditioned on equal access requirements, a condition the Commission has previously held to violate Section 332(c)(8) of the Act.

I. THE COMMISSION'S DECISION THAT THE BUS OFFERING IS A MOBILE SERVICE HAS SOLID SUPPORT IN THE FACTS IN THE RECORD AND IS CONSISTENT WITH THE STATUTE AND PRIOR COMMISSION PRECEDENT.

A. The Commission Properly Found, Based on the Uncontested Facts in the Record, that BUS Is a Mobile Service.

After carefully considering the record relating to Western Wireless' BUS offering, the Commission properly concluded that the BUS terminal equipment is both "capable of being moved" and "ordinarily does move," thus satisfying the statutory definition of "mobile station," 3/ and accordingly, that the BUS service offering qualifies as a mobile service. Specifically, the Commission relied upon three principal facts: (1) the BUS terminal equipment operates while in motion, including seamless hand-off and roaming on regular cellular networks; (2) the mobility of BUS equipment is demonstrated to customers by sales staff, and the terms of service explicitly provide for mobile service; and (3) customers ordinarily use the units while in motion, as demonstrated by billing records that show roaming charges incurred for use of the BUS terminal outside subscribers' local calling areas. These facts remain uncontested

3/ 47 U.S.C. § 153(28) (defining mobile station as a "radio-communication station capable of being moved and which ordinarily does move").

by the Independents or any other party. Although points (1) and (2) provide a sound basis for reasonably concluding that the units are likely to "ordinarily move," the billing records, produced on Commission staff's request, referenced in (3) demonstrate conclusively that mobile use "is not out of the ordinary." 4/

The Independents themselves cite with approval Commissioner Abernathy's belief that the statute intends for the Commission to focus on the "intended or typical use" of equipment. 5/ Western Wireless unequivocally *does intend* that BUS units will be used in mobile mode, as evidenced by the fact that: (1) the units were designed to work on any cellular network, just like any other analog mobile unit; 6/ (2) the units are portable and come with a battery, so that they can be used "on the go;" (3) the mobility of the BUS unit is a critical local telephone service marketplace differentiator for Western Wireless; and (4) the marketing literature promotes mobile operation. These facts in the record are sufficient for the Commission to establish, as the Independents state, "a rational basis between the facts found and the conclusions reached." 7/

4/ Order at ¶ 19.

5/ Petition at 3.

6/ As the Order correctly notes, the capability of mobile operation is a "significant indicator that mobile use is an intended 'ordinary' use," as Western Wireless otherwise would have had no reason to invest in equipment with cellular hand-off capability. Order at ¶ 19.

7/ Petition at 6.

B. The Order's Legal Interpretation of the "Mobile" Definition in the Act Is Well-Supported and Reasonable, Unlike the Alternative Approach Suggested By The Independents.

1. The Commission's Interpretation of the "Ordinarily Does Move" Language in the Statute is Reasonable.

In the Order, the Commission correctly rejected the Independents' argument that the "ordinarily does move" language in the statute "requires an affirmative showing that customers usually or typically use the wireless unit while mobile." 8/ The Independents essentially reiterate this argument with no additional support, 9/ and the Commission should once again reject it. The Commission reasonably concluded that the "ordinarily does move" language in the statute is satisfied if mobile operation is "an inherent part of the service offering that is reasonably likely and not an extraordinary or aberrational use of the equipment." 10/ Moreover, such a conclusion is fully consistent with Webster's "not exceptional" definition of "ordinary," a definition proffered by the Independents themselves. 11/

Indeed, despite their mantra of relying on the "plain meaning" of the statute, the Independents themselves advocate an interpretative approach that requires reading additional content into the statutory text. Specifically, the

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8/ Order at ¶ 20.

9/ The Independents repeatedly allege that the Commission's Order violates the plain meaning of the "ordinarily does move" element in the statutory definition of mobile station. In an attempt to expound upon the "ordinary meaning" of "ordinarily," they proffer a variety of synonyms, such as "customary," "normal," "commonplace," "not exceptional," etc. *See* Petition at 3-7 and n.12.

10/ Order at ¶ 20.

11/ Petition at 3. Indeed, Merriam-Webster's Thesaurus lists "extraordinary" as the first synonym for "exceptional." Merriam-Webster Online, *Collegiate Thesaurus*, available at <http://www.m-w.com/cgi-bin/thesaurus?book=Thesaurus&va=exceptional> (viewed on October 11, 2002).

Independents assert that size and weight should be factors used in assessing a device's mobility, and that such factors should be measured by "current market" standards. But this "beauty contest" approach would be completely unworkable and infeasible, since it would require the Commission to change the regulatory status of wireless services as consumer acceptance and usage patterns of particular equipment shift. 12/ Moreover, it is obvious that no such requirement appears in the statute. Nor does the statute contain any specific percentage of mobile use that is required to be considered "ordinary."

The inherent ambiguity of the "mobile station" definition in the statute, along with other definitions in the Communications Act, has been noted by the Second Circuit, which opined that they "are lacking in both clarity and apparent usefulness." 13/ The court specifically remarked that the "mobile station" and "land station" definitions "are best described as much ado about nothing." 14/ It is a well-established legal principle that when a statute is not sufficiently clear on its face, courts defer to the discretion and expertise of the agency charged by Congress with

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12/ *Id.* at 6-7. For example, the Independents contend that Inmarsat-M satellite terminals (similar or even larger in size than BUS terminals) "will no longer ordinarily move" once they are abandoned for smaller, lighter handsets. *Id.* at n.12. Under this approach, the Commission would have to be constantly engaged in market research to determine which devices consumers are more likely to "ordinarily" move than other consumer devices. The Independents offer no suggestions as to what percentage of mobile use by consumers would be sufficient to meet their definition of "ordinary." Similarly, their proposal is also unworkable because, under their actual consumer use standard, the Commission apparently would not be able to classify a service until the service was already in use, so that an "ordinary" usage pattern could be established. Moreover, the exact same service offering (same spectrum, network and rate plan) could be treated differently for customers depending on the CPE being used by each customer.

13/ *Sprint Spectrum v. Craig Willoth*, 176 F.3d 630, 641 (2d Cir. 1999).

14/ *Id.*, 176 F.3d at 641, note 2.

implementation of the statute. As the Supreme Court explained in the seminal *Chevron* case::

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." . . . We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies 15/

Here, Congress left a gap regarding what type and extent of showing must be made to conclude reasonably that a device "ordinarily moves." As the agency designated by Congress with implementation of the Communications Act, 16/ the Commission is the appropriate entity to fill this gap, and its judgment should not be disturbed so long as it reaches a "permissible construction" of the statute. 17/

2. Congress Acceded to the Commission's Long-Standing Approach to Defining Which Services Are "Mobile."

Contrary to established canons of statutory interpretation, the Independents claim that there is no showing that Congress was aware of and acquiesced to the Commission's precedent, under which the definition of mobility does

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15/ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 844 (1984), quoting Morton v. Ruiz, 415 U.S. 199 (1974). *See also National Cable & Telecommunications Association, Inc. v. Gulf Power Co., et al.*, 534 U.S. 327 (2002) (making clear that the Court would defer to the FCC's judgment on technical matters relating to any ambiguous text in the Communications Act); *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 740-741 (1996) (holding that when Congress has "left ambiguity in a statute meant for implementation by an agency," there is "a presumption that Congress . . . understood that the ambiguity would be resolved, first and foremost, by the agency").

16/ *See* 47 U.S.C. § 151 (creating the FCC "to execute and enforce the provisions of this Act").

17/ *Chevron*, 467 U.S. at 843.

not depend upon how most customers actually use a piece of equipment or service. 18/ But established legal principles make it clear that the Independents are wrong on this point. The Supreme Court has held that, when Congress amends a statute or adopts new law incorporating sections of existing law, it is presumed to be aware of the existing administrative precedent relating to the existing statute. 19/

Congress passed amendments to the Act in 1993 and 1996, 20/ both of which related to or made reference to mobile services, but Congress did not take these opportunities to amend the mobile station definition or otherwise to impose the Independents' interpretation of the "ordinarily does move" language. Congress' decision not to revise the statute on this point indicates that the Commission's existing interpretation has been accepted by Congress. 21/

In fact, legislative history of the 1993 Budget Act shows that Congress considered, and decided *against* excluding the possibility of certain fixed services

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18/ Order at ¶ 21; Petition at 4. Although willing to broach the subject of Congressional intent, the Independents astutely avoid any discussion of the *original* Congressional intent when the statutory language was passed. The mobile station definition has existed unchanged since the Act's adoption in 1934, and in fact dates back to the 1927 International Radiotelegraph Convention. Legislators at that time would have had in mind equipment that is orders of magnitude larger and heavier than the BUS unit.

19/ *See Department of Housing and Urban Development v. Rucker*, __ U.S. __, 122 S.Ct. 1230, 1234 (2002) (Congress, when amending statute, was "presumed to be aware" of HUD's existing interpretation of statute) (citing *Lorillard v Pons*, 434 U.S. 575, 580 (1978)); *Merrill Lynch, Pierce, Fenner & Smith, et al. v. J. J. Curran et al.*, 456 U.S. 353, 382 (1982).

20/ *See* the Omnibus Budget Reconciliation Act of 1993, Public Law No. 103-66, Title VI, § 6002(b)(2), 107 Stat. 312, 392 (1993) ("1993 Budget Act"); Telecommunications Act of 1996, Public Law No.104-104, 110 Stat. 56 (1996).

21/ *See Zemel v. Rusk*, 381 U.S. 1, 11 (1965) ("Congress' failure to repeal or revise [the statute] in the face of such administrative interpretation [is] persuasive evidence that the interpretation is the one intended by Congress); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction").

falling within the definition of "mobile services." The Senate version of the legislation would have amended the definition of mobile services contained in 47 U.S.C. §153(27), to clarify "that the term does not include rural radio service or the provision by a local exchange carrier of telephone exchange service by radio instead of by wire." 22/ The House version contained no such exclusion. The conferees adopted the House version, thereby indicating clear Congressional intent *not* to foreclose the Commission's ability to classify, in appropriate circumstances, wireless local exchange-equivalent services as "mobile services."

3. The Commission Properly Relied on Its Prior Precedent

The Independents criticize the Commission for doing exactly what it is supposed to do, namely, for deciding the Petition in accordance with its existing precedent – the same precedent that Congress has implicitly endorsed. The Independents would have the Commission change course and impose a much more restrictive interpretation of what constitutes a "mobile station," and accordingly, what qualifies as a mobile service. 23/ Such an about-face in policy-making is impermissible without a "reasoned analysis" for the shift, 24/ which the Independents failed to offer.

22/ 1993 Budget Act Conference Report at 497.

23/ The Independents criticize the Order for citing distinguishing precedent relating to the BETRS service, which the Commission determined was not a mobile service. The Independents complain that the Commission failed to cite evidence that BETRS does not have the same mobile *capability* as the BUS equipment. The nature of BETRS terminals is a matter of public record. BETRS units are most often mounted on telephone poles which can be up to a mile from the subscriber's residence, and can serve up to four subscribers. *See* Status of Radio and Antenna Equipment Used in the Basic Exchange Telephone Radio Service, *Memorandum Opinion and Order*, 4 FCC 2224, 2224-25, ¶¶ 4, 7 (1989).

24/ *See, e.g., Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 56 (1983).

In sum, the Commission's reading of the "ordinarily does move" language in the statute is not only permissible, it is the most sensible and appropriate interpretation in the context of the facts in the record, and is squarely consistent with established legal principles. The Commission should reject the Independents' petition for reconsideration in this regard.

C. The Independents' Assertion That Portions of the Order Are Not "By The Commission" Lacks Both Legal Support and Legal Significance

Finally, the Commission should disregard the Independents' frivolous and unfounded request to "clarify" that the Order's finding that BUS "ordinarily does move" is not "By the Commission." 25/ The issue is irrelevant and without legal significance because there is no question that three of the four Commissioners agree "that BUS should be regulated as CMRS." 26/ The Independents' argument is simply wrong: of the three Commissioners voting to approve the result reached by the Order, a majority agree that the BUS equipment satisfies the "ordinarily does move" definition. Moreover, to conclude that this decision is not "By the Commission" would jeopardize the importance and significance of concurring opinions. The fact that Commissioner Abernathy filed her own critique of how the Commission could have reached an identical result using a slightly different analysis, does not mean that this decision was released without a majority vote.

25/ Petition at 2.

26/ *Id.*

II. THE COMMISSION SHOULD REJECT THE INDEPENDENTS' CHALLENGE TO ITS WELL-SUPPORTED DECISION THAT WESTERN WIRELESS' OFFERING QUALIFIES AS AN INCIDENTAL SERVICE AND IS THEREFORE CMRS.

The Commission should reject the Independents' renewed challenge to the finding in the Order that the BUS offering qualifies as an incidental service, and therefore qualifies to be regulated as a mobile service. 27/ Again, the Independents present no justification for the Commission to reconsider its well-grounded conclusion, based on long-settled law established in Commission decisions dating back at least to 1994. While the Independents say that they disagree with many of those cases, 28/ they present no justification for the Commission to depart from its precedents, established through a series of notice-and-comment rulemaking proceedings, in a declaratory ruling proceeding such as this.

The Commission's Order relied on the 1996 *CMRS Flex Order* for the proposition that incidental services are treated as CMRS for regulatory purposes. 29/ The Independents assert that the Commission's reliance on this precedent is somehow not valid because the 1996 *CMRS Flex Order* itself did not provide adequate rationale for finding that incidental services fall within the statutory definition of mobile. 30/

27/ Petition at 8-10; Order at ¶¶ 26-29.

28/ *See, e.g.,* Petition at 9-10 (arguing that the *Second CMRS Flex Order*, issued in 2000, misconstrued earlier precedent).

29/ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965, 8977 (1996).

30/ The Independents also complain that the Order's finding that BUS qualifies as an incidental service under Section 22.323 of the Commission's rules proves nothing regarding the regulatory status of the service, as the rule itself does not declare incidental services to be

Even if there were any merit to the substance of their argument, which there is not, the Independents are some six years late in raising this issue. The time for challenging that decision was in 1996, not 2002. That order, as well as others, are now part of Commission precedent. Indeed, in its recent order eliminating Section 22.323 of its rules, the Commission re-affirmed its prior precedent regarding CMRS treatment of incidental services, and made it clear that such decisions do not depend on the presence of the rule itself. 31/

Thus, as discussed above, 32/ the Commission did nothing improper in adhering to its long-established precedent, established through a series of rulemaking proceedings, and applying "mobile" regulatory treatment to offerings that are "incidental" to mobile services. To the contrary, it would have been improper for the Commission to change course in a declaratory ruling proceeding such as this, in the manner suggested by the Independents. Moreover, as discussed above, 33/ Congress can be assumed to have been aware of the Commission's existing precedent treating "incidental" services as mobile when it amended the statute in 1996, and, by declining

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CMRS. It is a basic tenet of common law that law need not be codified in rules or statutes. Decisions contained in Commission orders are binding, even if not codified.

31/ *See Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service*, WT Docket No. 01-108, Report and Order, FCC 02-229 (rel. Sept. 24, 2002) at ¶ 68 ("We emphasize that our elimination of the rule in no way diminishes or otherwise alters either the right of Part 22 licensees to provide incidental services or the regulatory treatment of those services as CMRS, which we have repeatedly affirmed in prior orders.").

32/ *See supra* at 9 (Sec. I.B.3).

33/ *See supra* at 7-9 (Sec. I.B.2).

to adopt any change to the relevant portion of the Act, implicitly acceded to the Commission's existing, eminently reasonable approach.

Finally, the Independents are unconvincing in arguing, against the weight of settled Commission precedent, that a service like BUS that is "incidental" to mobile service should not itself qualify for regulatory treatment as "mobile." In this case, Western Wireless' BUS offering uses the same spectrum, the same network infrastructure, and the same billing and customer care infrastructure, as the basic "cellular radiotelephone service" offered to subscribers who use conventional cellular CPE, and the record shows that BUS represents less than 1% of Western Wireless' total subscriber base in Kansas. 34/ BUS is barely, if at all, distinguishable or severable from the basic mobile cellular service; the only differences are the CPE that customers use and the rate plan that they select. It would hardly be practicable or justifiable to apply dramatically different regulatory classifications to a small subset of a carrier's overall service offerings based on the CPE that customers decide to use, or based on customers' selection of a rate plan. For this reason, the Commission's decision to classify BUS as an "incidental" service and to treat it, together with the broader cellular service with which it is closely associated, as a "mobile" service, is not only consistent with the statutory definitions and compelled by Commission precedents; it is also makes logical sense and is the only practicable approach.

34/ Order at ¶ 27.

III. THE COMMISSION SHOULD REJECT THE INDEPENDENTS' CALL FOR SO-CALLED "CLARIFICATION" THAT STATES MAY PRECLUDE CMRS ENTRY BY UNLAWFULLY REQUIRING EQUAL ACCESS.

The Commission should reject the Independents' request for clarification of the Order's implications for states' ability to impose equal access or other conditions on universal service eligible telecommunications carriers ("ETCs"), because that request is both procedurally improper and substantively unfounded. As an initial matter, a petition for reconsideration of a Commission order that is specific to one particular service offering of a carrier is not an appropriate vehicle for the broad, generally applicable policy issues raised in Section III of the Petition. More fundamentally, the Commission has already rejected this suggested "clarification," and should once again reject it here, because it is manifestly anti-competitive.

The Commission ruled correctly, consistent with applicable laws and precedents, that because BUS is CMRS, the Kansas commission may not impose an equal access requirement on Western Wireless as a condition of receipt of state universal service fund support. 35/ The Independents seek "clarification" of this clear and unequivocal ruling, suggesting that the Commission has inadvertently prohibited a state commission from including equal access as a required supported service for CMRS providers who are state ETCs. 36/ As a CMRS provider, Western Wireless is not legally required to offer equal access to long distance service providers, and as such, the Company and the competitive wireless industry as a whole have established pro-consumer service offerings and rate plans based upon their status as CMRS

35/ Order at ¶ 1.

36/ Petition at 11.

providers. It would be unlawful to condition Western Wireless' entitlement to federal and state universal service support for BUS based upon compliance with an equal access requirement that applies to incumbent local exchange carriers that have a monopoly or near-monopoly position in the local market. While no clarification is needed, to the extent the Commission addresses this issue, it should affirm its conclusion that both Section 332(c)(8) and Section 254(f) prohibit the imposition of an equal access requirement on CMRS providers, regardless of whether they seek support from federal and state universal service funds.

In support of their request for clarification, the Independents suggest that a state-imposed equal access condition is not a "requirement" imposed on a CMRS provider because ETC status is optional. 37/ In other words, the Independents argue that because CMRS providers are not compelled to seek state universal service support, an equal access requirement can be imposed on CMRS provider ETCs without violating 47 U.S.C. § 332(c)(8). 38/ Contrary to the Independents' argument, the Commission has clearly called such a condition a "requirement" that would violate Section 332(c)(8):

> [I]ncluding equal access to interexchange service among the services supported by universal serve mechanisms would *require* a Commercial Mobile Radio Service (CMRS) provider to provide equal access in order to receive universal service support. *We find that such an outcome would be contrary to the mandate of section 332(c)(8)*, which prohibits any requirement that CMRS providers

37/ Petition at 12.

38/ Petition at 11.

> offer "equal access to common carriers for the provision of toll services."39/

The Commission should not depart from its long-held conclusion that such a condition would be a "requirement" under the language of Section 332(c)(8). 40/

Independents next argue that a state's right to establish state universal service support mechanisms under Section 254(f) would allow it to support only carriers that provide equal access, notwithstanding Section 332(c)(8). 41/ This argument must be rejected. Section 254(f) provides:

> A state may adopt regulations *not inconsistent with the Commission's rules* to preserve and advance universal service. . . . A State may adopt regulations to provide for additional definitions and standards *to preserve and advance universal service* within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms (emphasis added).

In its 2000 *Kansas USF Order*, the Commission concluded that, to be lawful under Section 253, a provision of a state universal service program must be competitively neutral, consistent with Section 254, and "necessary to preserve and

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39/ Federal-State Joint Board on Universal Service, *First Report and Order*, 12 FCC Rcd 8776, 8819, ¶ 78 (1997) ("*Universal Service Order*") (emphasis added) , *subsequent history omitted*. The Joint Board recently deadlocked on the question of whether to impose equal access as a federal ETC requirement, and did not forward to the Commission any recommendation to change the Universal Service Order's determination not to do so. Federal-State Joint Board on Universal Service*, Recommended Decision*, 17 FCC Rcd 14095 (Fed.-State Joint Bd., 2002).

40/ The Independents cite a Utah Supreme Court decision in support of their argument. Petition at 12. This decision is patently inconsistent with the Commission's precedent, did not even discuss the Section 254(f) limitations on state universal service fund rules, and has inhibited competition from developing. The Commission should give no weight to this analysis.

41/ Petition at 11. Notably, the Independents supply only a partial quotation of Section 254(f), and omit the critical requirement that state universal service requirements must "not [be] inconsistent with the Commission's rules."

advance" universal service. 42/ Under these criteria, a state cannot limit universal service funding only to equal access providers.

Imposing an equal access requirement, in the name of "regulatory parity," could exclude an entire class of carriers – CMRS providers, a class for whom the equal access requirement was never intended in the first place. The Commission has already specifically rejected an equal access requirement on competitive neutrality grounds: "competitive neutrality does not require that, in areas where incumbent LECs are required to offer equal access to interexchange service, other carriers receiving universal service support in that area should also be obligated to provide equal access." 43/ The Commission went on to hold that "supporting equal access would undercut local competition and reduce consumer choice and, thus, would undermine one of Congress's overriding goals in adopting the 1996 Act." 44/ This is even more evident today, when CMRS providers are the only meaningful competitive option in most rural ILEC service areas. The Independents' suggestion that a state-imposed equal access requirement is competitively-neutral and necessary to advance universal service has been specifically rejected, and should be rejected again. An equal access program requirement applied to wireless ETCs would violate the

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42/ Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas Universal Service Fund, *Memorandum Opinion and Order*, 15 FCC Rcd 16227, 16231-33, ¶¶ 9-11 (2000) ("Kansas USF Order").

43/ *Universal Service Order*, 12 FCC Rcd at 8819-20, ¶ 79. The Commission rejected arguments that competitive neutrality means that "symmetrical" requirements should apply both to incumbents and new entrants without market power: "[S]tatutory and policy considerations preclude us from imposing 'symmetrical' service obligations on all eligible carriers, including the obligation to provide equal access to interexchange service, as a condition of eligibility under section 214(e)." *Id.*

44/ *Id.*

competitive neutrality requirement under Sections 253 and 254 and thus cannot be a condition for state universal service fund support.

Western Wireless believes the intent of the Commission's Order in this case was clear – Kansas cannot impose an equal access requirement on Western Wireless' BUS for state or federal fund purposes. To the extent any clarification is necessary, the Commission should reaffirm its Order (and its original *Universal Service Order*) on this point. 45/

CONCLUSION

In a desperate attempt to impose burdensome state requirements on Western Wireless, and to preserve their monopoly power by fending off increasing wireless competition, the Independents have submitted a Petition that rehashes arguments already considered and rejected by the Commission. Moreover, the Petition puts forth a number of unsupported legal conclusions that indicate a fundamental misunderstanding of established legal principles, and that at times enter the realm of the frivolous. The Commission's Order was a well-reasoned analysis based on the undisputed facts in the record, which, unfortunately for the Independents,

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45/ This analysis is not undercut by the Fifth Circuit's reversal of the FCC's holding that Section 214(e)(2), by its own terms, precludes state commissions from imposing additional ETC eligibility criteria. *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 417-18 (5th Cir. 1999). First, the discussion above concerns different sections of the Act – Sections 253, 254(f), and 332(c)(8) – from the provision interpreted by the Fifth Circuit (Section 214(e)(2)). Second, the Fifth Circuit merely reversed the FCC's interpretation of the plain language of the statute – indeed, it held that "[n]othing in [§ 214(e)(2)], under this reading of the plain language, speaks at all to whether the FCC may prevent state commissions from imposing additional criteria on eligible carriers." 183 F.3d at 418. By contrast, as noted above in text, Section 332(c)(8) specifically prohibits the imposition of equal access requirements on CMRS carriers; Section 254(f) specifically requires that state universal service program rules be "not inconsistent with the Commission rules; and Section 253(b) precludes state programs that effectively preclude entry and are not "competitively neutral."

simply do not support the findings they advocate. For the foregoing reasons, the Commission should reject the Independents' Petition in its entirety.

Respectfully submitted,

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October 16, 2002

CERTIFICATE OF SERVICE

I, Jean Claire Meikle, hereby certify that on this 16th day of October, 2002, the foregoing Opposition of Western Wireless was served on the following by first class mail or by electronic delivery.

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